Supreme Court, U. S.
FILED
DEC 11 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-906

RANCHO LA COSTA, INC., dba LA COSTA COUNTRY CLUB,

Petitioner,

v.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD and CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD AND THE CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

LEROY S. HULDEN
DONNELLEY & HULDEN
3366 Fifth Avenue
San Diego, California 92103
Telephone: (714) 299-8350

Attorneys for Petitioner

December 10, 1979

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

TOPICAL INDEX

PAGES

Table of Authorities Cited..... iv-vii

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD AND THE CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL..... 1

I. OPINIONS BELOW..... 2-3

II. JURISDICTION..... 4

III. QUESTION PRESENTED..... 4

IV. STATEMENT OF THE CASE..... 5-9

V. STATEMENT OF FACTS..... 9

Licensed Premises..... 9-10

The Misconduct..... 10-11

Previous Arrests for Prostitution at La Costa..... 11

Attempts to Control Prostitution..... 12-16

Duties and Supervision of Rayo..... 16-18

VI. SUMMARY OF THE ARGUMENT..... 19

ARGUMENT:

PAGES

A. A LIQUOR LICENSE IS A SUBSTANTIAL BENEFIT CONFERRED UPON THE LICENSEE AND SUSPENSION OF THAT LICENSE MUST COMPLY WITH THE REQUIREMENTS OF DUE PROCESS..... 19-21

B. EVEN THOUGH THE TWENTY-FIRST AMENDMENT CONFERS BROAD POWERS ON THE STATES WITH RESPECT TO THE CONTROL OF ITS LIQUOR INDUSTRY, THE STATE'S ACTION IN SUSPENDING LA COSTA'S LIQUOR LICENSE IS UNREASONABLE AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT..... 21-27

C. THE STATE'S APPLICATION OF ITS CONSTITUTION AND STATUTES TO THE SUSPENSION OF LA COSTA'S LIQUOR LICENSE IS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT..... 27-37

VII. SUMMARY..... 37-41

VIII. APPENDICES.....

A. NOTICE OF HEARING DENIED BY THE CALIFORNIA SUPREME COURT DATED September 12, 1979..... App. 1

PAGES

B. NOTICE OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO REVIEW ORDER OF ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD ISSUED BY THE FOURTH APPELLATE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA DATED August 17, 1979..... App. 2

C. DECISION BY ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD FILED July 17, 1979. App. 3-17

D. CERTIFICATE OF DECISION BY THE STATE OF CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL DATED August 24, 1978..... App. 18

E. PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE OF DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL DATED August 17, 1978..... App.19-20

F. CONSTITUTIONS AND STATUTES App.21-24

G. FOOTNOTES..... App.25-26

TABLE OF AUTHORITIES CITED

PAGES

UNITED STATES SUPREME COURT CASES

Armstrong v. Manzo, 380 U.S. 545, (1965).....32

Bell v. Burson, 402 U.S. 535, (1971).....19

Board of Regents of State Colleges v. Roth, 408 U.S. 564, (1972).....20

California v. LaRue, 409 U.S. 109 (1972).....23

Eberle v. Michigan, 232 U.S. 700, (1913).....22

Goldberg v. Kelly , 397 U.S. 254, (1970).....32

Goss v. Lopez, 419 U.S. 565, (1975).....20,34

Gregory v. City of Chicago, 394 U.S. 111, (1969).....36

Hostetter v. Idelwild Bon Voyage Liquor Corp., 377 U.S. 324, (1964).....22

Lindsey v. Normet, 405 U.S. 56, (1972).....31

Morissette v. United States, 342 U.S. 246, (1951).....26

Morrissey v. Brewer, 408 U.S. 471, (1972).....19

Sherbert v. Verner, 374 U.S. 398, (1963).....19

Table of Authorities (Cont.d)

PAGES

Slochower v. Board of Education, 350 U.S. 551 (1956).....19

Joseph E. Seagram & Son, Inc. v. Hostetter, 384 U.S. 35, (1966)..22

South Carolina v. United States, 199 U.S. 437 (1905).....22

Speiser v. Randall, 357 U.S. 513 (1958).....19

Vanlare v. Hurley, 421 U.S. 338 (1975).....34

FEDERAL REPORTER CASES

Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975).....35

Parks v. Allen, 426 F.2d 610, (5th Cir. 1970).....24

Pearson v. Northeast Airlines, Inc., 309 F.2d 553, (2nd Cir. 1962).....22

Women's Liberation Union of Rhode Island v. Israel, 512 F.2d 106 (1st Cir. 1975).....23-24

FEDERAL SUPPLEMENT CASES

Dallam v. Cumberland Valley School District, 391 F. Supp. 358, (1975).....21

Table of Authorities (Cont.d)

PAGES

Page v. Jackson, 398 F.Supp. 263 (N.D. Ga. 1974).....30

Smith v. McGriff, 434 F.Supp. 673, (1976).....21

Smith v. Thompson, 377 F.Supp. 556, (N.D. Ga. 1974).....30

CONSTITUTIONS

California Constitution, Art. XX, Section 22.....5,6,7,28, 39, App.F

United States Constitution, Fourteenth Amendment .....App. F

United States Constitution, Twenty-First Amendment.....22,App.F

STATUTES

United States Code Annotated, Title 28, Section 1257(3).....4

CALIFORNIA STATUTES

Administrative Code, Title IV, Sections 1 et. seq.....20

Business and Professions Code
Section 23000 et. seq.....20
Section 24200(a).....5,7,20, 28-29,App.F
Section 24200(b).....6,7,App.G

Table of Authorities (Cont.d)

CALIFORNIA STATUTES (Cont.d) PAGES

Government Code 11500 et. seq.....21

Penal Code Sections 266 (i), 664, and 647(b).....6,6,6, App. G

IN THE

SUPREME COURT OF THE UNITED

STATES

OCTOBER TERM, 1979

NO. _____

RANCHO LA COSTA, INC., dba LA COSTA COUNTRY CLUB, Petitioner.

vs.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD AND THE CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

The petitioner RANCHO LA COSTA, INC., a Nevada corporation, dba LA COSTA COUNTRY CLUB (hereinafter referred to as "LA COSTA") respectfully prays that a

writ of certiorari issue to review the judgment and opinion of the California Alcoholic Beverage Control Appeals Board which has been refused review by the California courts and affirmed by the California Supreme Court in this proceeding on September 12, 1979 by denial of a hearing.

OPINIONS BELOW

The Supreme Court of California summarily denied a hearing on LA COSTA's Petition for Hearing and for a Writ of Review and Request for Temporary Stay, without any hearing or written opinion; a copy of the notification of said denial, dated September 12, 1979, is set forth in Appendix A hereto.

By an order dated August 17, 1979, the Court of Appeals of the State of California, Fourth Appellate District, Division One, also summarily denied without any hearing LA COSTA's Petition

for a Writ of Certiorari to Review the Order of Alcoholic Beverage Control Appeals Board with Request for Temporary Stay. A copy of the order of the Court of Appeals is set forth in Appendix B hereto.

The decision of the Alcoholic Beverage Control Appeals Board was filed on July 17, 1979, and is set forth in Appendix C hereto. That decision affirmed the decision of the Department of Alcoholic Beverage Control entered on August 24, 1978, which in turn had adopted the proposed decision of the Administrative Law Judge filed on August 17, 1978, setting forth her findings and conclusions. The decision of the Department of Alcoholic Beverage Control is set forth in Appendix D hereto, and the proposed decision of the Administrative Law Judge is set forth in Appendix E hereto.

JURISDICTION

The summary denial of a hearing on LA COSTA's petition to the Supreme Court of California was entered on September 12, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C §1257(3).

QUESTION PRESENTED

Whether the State of California acted in violation of the due process clause contained in the Fourteenth Amendment to the United States Constitution when, contrary to its constitution and statutes, it suspended LA COSTA's liquor license on the basis of strict liability for the single illegal act committed by an employee who was not acting within the scope of his employment and whose scope of employment did not include the sale of alcoholic beverages.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED - APPENDIX F

STATEMENT OF THE CASE

On January 20, 1978, the Department of Alcoholic Beverage Control (hereinafter the "Department") filed an accusation against LA COSTA dated November 16, 1977, which charged that LA COSTA, by and through its agent and employee, Frank Rayo, permitted and suffered its licensed premises to be used in a manner which created conditions contrary to public welfare and morals in violation of Article XX, Section 22 of the Constitution of the State of California and Section 24200(a) of the California Business and Professions Code in that:

> "1. On or about July 25, 1977, respondent by its agent and catering manager, Frank Rayo, did suffer and permit the said premises to be used as a place where Frank Rayo did solicit and attempt to solicit confidential informant 'Rhonda' to engage in an act of prostitution.

> 2. On or about July 25, 1977, respondent by its agent and catering manager, Frank Rayo, did suffer and permit the said premises to be used as a place wherein Frank Rayo did procure and attempt to procure confidential informant 'Rhonda' to engage in an act of prostitution."

The accusation charged that by reason of these allegations grounds for suspension and revocation of LA COSTA's liquor licenses existed pursuant to Section 24200(a) of the Business and Professions Code and Article XX, Section 22 of the State Constitution.

Additional grounds were alleged to exist under California Business and Professions Code Section 24200(b)[1] by reason of an alleged violation by LA COSTA of California Penal Code Sections 266(i)[2], 664[3] and 647(b)[4].

A hearing on said accusation was held on August 2 through August 4, 1978 in San Diego, California before Administra-

tive Law Judge Marilyn L. Nelson wherein the issues of due process were orally argued. The proposed decision of the administrative Law Judge (Appendix E) was filed on August 17, 1978, and concluded that the accusation was true and that petitioner was subject to discipline under Section 24200(a) of the Business and Professions Code and Article XX, Section 22 of the State Constitution. The decision also found that grounds did not exist for discipline pursuant to Section 24200(b) of the Business and Professions Code.

On August 24, 1978, the Department adopted the proposed decision of the Administrative Law Judge as its decision in the case (Appendix D). Pursuant to a Notice of Appeal filed by LA COSTA on September 5, 1978, a hearing was held before the Alcoholic Beverage Control Appeals Board (hereinafter referred to

as the "BOARD"). In the brief to the Board, LA COSTA presented its arguments pursuant to the due process clause. On July 17, 1979, the BOARD filed its written opinion affirming the decision of the Department, completely ignoring the due process issues, and ordering LA COSTA's liquor licenses be suspended (Appendix C).

On August 16, 1979, LA COSTA filed its Petition for a Writ of Certiorari to Review Order of Alcoholic Beverage Control Appeals Board and for Temporary Stay in the California Court of Appeals, Fourth Appellate District, Division One. The Petition contained LA COSTA's arguments pursuant to the due process clause. On August 17, 1979, said Petition and Request for Temporary Stay was summarily denied without a hearing by the Court of Appeals (Appendix B).

On August 27, 1979, LA COSTA filed its Petition for Hearing and for Writ of Review and Request for Temporary Stay in the California Supreme Court. The Petition contained LA COSTA'S arguments pursuant to the due process clause. On September 12, 1979, said Petition was summarily denied without a hearing by the Supreme Court (Appendix A).

STATEMENT OF FACTS

LICENSED PREMISES

LA COSTA is located in Carlsbad, California about thirty miles north of San Diego. The resort covers an area of approximately 12 acres not including the 18-hole championship golf course (R.T. 140). In July of 1977, LA COSTA employed approximately 950 people (R.T. 163). LA COSTA holds a bona fide master liquor license, three duplicate licenses and a caterer's permit. The duplicate licenses

are for the tennis club, designated rooms on the lower floor of the main clubhouse, and for the additional bar on the lower level of the main clubhouse (R.T. 97).

THE MISCONDUCT

Rhonda Lillien, working as a paid, civilian undercover operative for the San Diego Sheriff's Department, was equipped with a tape recording device in her purse when she met one Terri Bishop at the LA COSTA cocktail lounge on July 25, 1977 (R.T. 5). Efforts were made to contact Frank Rayo by telephone (R.T. 6). After Rayo appeared, the three individuals sat in the bar area approximately 15 minutes before Rayo suggested that they go to his office for privacy (R.T. 7). The discussion in Rayo's office concerned "working La Costa customers" which Lillien understood to mean prostitution (R.T. 8).

Randall A. Anderson, a sergeant with

the San Diego Sheriff's Department, arrested Bishop and Rayo in Rayo's catering office while Lillien was present (R.T. 72). He gave Rayo the Miranda warnings (R.T. 73).

PREVIOUS ARRESTS FOR PROSTITUTION AT LA COSTA

San Diego County Sheriff's Sergeant Anderson testified that in the three and a half years that he had worked in the North County Vice Detail he had made only three other arrests for prostitution at LA COSTA (R.T. 75-76).

Roy J. Kundtz, Chief of Police for the City of Carlsbad, testified that male and female undercover officers had been at LA COSTA without the knowledge of the management for the past four years and that no arrests for prostitution had been made by the Police Department in that time (R.T. 209).

ATTEMPTS TO CONTROL PROSTITUTION

There are 28 basic departments within LA COSTA as well as several sub-departments. There are 37 department heads (R.T. 146). There had been numerous occasions at department head meetings where the department head had been instructed by the general manager, assistant general manager, the owners of LA COSTA and the director of security that any prostitution, gambling or other illegal activities observed on the premises should be immediately reported to the general manager or director of security, who in turn would notify local authorities (R.T. 153). All employees had been instructed that any involvement in prostitution would result in immediate termination and prosecution by the local authorities (R.T. 153). The express attitude of the management and board of directors of LA COSTA toward prostitution being con-

ducted on the premises is and has been that it is forbidden and will not be tolerated (R.T. 163).

LA COSTA maintains its own security staff on the property consisting of a director and four security guards (R.T. 151-152). During large golf and tennis tournaments numerous additional undercover agents help with crowd control and the prevention of any illicit activities on the property (R.T. 151). The head of security has been explicitly instructed by management that prostitution would not be tolerated on the premises (R.T. 152). Management has requested that the Carlsbad Chief of Police provide undercover detectives to help prevent prostitution at La Costa (R.T. 157). There is an ongoing effort with the Carlsbad Police Department to come out and work undercover to prevent prostitution in the

cocktail lounge (R.T. 158). In an effort to facilitate the undercover operations of the police officers, they have been provided hotel keys so that they can act as guests and more easily be able to conduct their investigations (R.T. 158). Carlsbad Chief of Police Kundtz testified that there was never a lack of cooperation by the LA COSTA management in ferreting out and controlling prostitution (R.T. 193). In his opinion the officials of LA COSTA had made a very good continual effort to control prostitution on the premises (R.T. 193).

William S. Huntington, a Carlsbad police detective, testified that he had been assigned for the previous four years to vice enforcement and had been at LA COSTA many times during that time period (R.T. 213). He stated that he would go out to LA COSTA on his own and

attempt to make contact with individuals or at other times he would receive a phone call from the management at LA COSTA who thought they had prostitutes working on the premises and requested assistance (R.T. 215). In his opinion LA COSTA has made a good effort at attempting to eliminate prostitution on the premises (R.T. 217).

Allard Roen, one of the major stockholders as well as Chief Operating Officer and Chairman of the Board of Directors of the LA COSTA, testified that the management does not want prostitution at LA COSTA because it is not the image they want for the resort (R.T. 241) and that prostitution would be detrimental to the resort because while it may satisfy a few guests it would alienate many more if solicitation for prostitution were observed (R.T. 247). Roen felt that if prostitution were permitted on the

premises, it would be detrimental to the resort's income as well as its reputation (R.T. 248-249).

DUTIES AND SUPERVISION OF RAYO

The declaration of Robin Kuest, the former general manager of LA COSTA, stated that Rayo, who was the catering manager of LA COSTA, had no control or authority with respect to the operation of the cocktail lounge, bars or liquor facilities. He had personally instructed Rayo and other employees that prostitution activities would not be tolerated and that such activity would result in immediate dismissal.

Robert S. Mott, the general manager of LA COSTA, testified that the catering manager has a staff of 28 people (R.T. 185). The catering manager is the liaison between management and conference or convention members (R.T. 253). The

catering manager is responsible for food functions in the conference center facility. He is concerned with the setup of the room, the decorations and generally insuring that the party goes well for the guests (R.T. 146). He can hire and fire within his department (R.T. 148). He has no authority to book rooms, to set prices, or to change menus (R.T. 147). He has no authority to provide alcoholic beverages (R.T. 148), and would have to arrange with the waitresses to serve wine with dinner when it was provided for on the conferees' menu (R.T. 184). He has no policy making authority (R.T. 148). All policy making decisions are made by the Board of Directors (R.T. 149).

Mott testified that Rayo was supervised by the general manager and on special occasions the assistant general

manager also supervised his delegated functions (R.T. 146). Mott stated that Rayo was specifically instructed on four or five different occasions that the management would not permit any improper activities, including prostitution on the premises (R.T. 167). Mott stated that as assistant general manager and as general manager he has never received a complaint indicating that Rayo may have participated in a call girl operation any time prior to July 1977 (R.T. 170). Roen stated no member of the Board of Directors, no person in a managerial capacity nor any employee knew of Rayo's acts in regard to prostitution prior to the time of his arrest. If they did know they would have been terminated as well (R.T. 249). Rayo was immediately terminated as a result of his illegal activity (R.T. 153-241).

REASONS FOR GRANTING THE WRIT

THE STATE, CONTRARY TO ITS CONSTITUTION AND STATUTES, AND WITHOUT NOTICE TO ITS LIQUOR LICENSEES, HAS CREATED A STANDARD OF STRICT LIABILITY FOR AN EMPLOYEE'S ILLEGAL ACT COMMITTED OUTSIDE THE BUSINESS AND OPERATION OF THE LICENSE.

A. A LIQUOR LICENSE IS A SUBSTANTIAL BENEFIT CONFERRED UPON THE LICENSEE AND SUSPENSION OF THAT LICENSE MUST COMPLY WITH THE REQUIREMENTS OF DUE PROCESS.

A threshold consideration for due process analysis is whether there has been or will be any deprivation of life, liberty or property to trigger the operation of the Fourteenth Amendment to the United States Constitution. The distinction between right and privilege is no longer constitutionally significant for such analysis. Bell v. Burson, 402 U.S. 535, 539 (1971); Morrissey v. Brewer, 408 U.S. 471, 482 (1972); Sherbert v. Verner, 374 U.S. 398, 404 (1963); Slochower v. Board of Education, 350 U.S. 551 (1956); Speiser v. Randall,

357 U.S. 513 (1958). However, deprivation of some entitlement or significant right is required before the due process protections become operative. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). The substantial benefit involved in the instant case is the entitlement to and possession of a liquor license.

> "Protected interests in property (within the Fourteenth Amendment) are normally not created by the Constitution. Rather they are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits." Goss v. Lopez, 419 U.S. 565, 572 (1975).

The State has established laws, rules and regulations that deal with the procurement, enforcement and suspension of liquor licenses (California Business and Professions Code, Section 23000 et seq.); California Administrative Code, Title IV, Sections 1 et seq.). Furthermore, the

State has established legislation concerning the procedural and evidentiary requirements relating to hearings on the question of suspension or revocation of a liquor license (California Government Code Section 11500 et seq.).

It is clear that the limitations of due process apply to the Alcoholic Beverage Control Department's power to suspend or revoke a liquor license once the STATE has, through its legislative branch, conferred a substantial benefit, to wit, a liquor license, upon LA COSTA. Dallam v. Cumberland Valley School District, 391 F. Supp. 358, 361 (1975); Smith v. McGriff, 434 F. Supp. 673, 680 (1976).

B. EVEN THOUGH THE TWENTY-FIRST AMENDMENT CONFERS POWERS ON THE STATES WITH RESPECT TO THE CONTROL OF ITS LIQUOR INDUSTRY, THE STATE'S ACTION IN SUSPENDING LA COSTA'S LIQUOR LICENSE IS UNREASONABLE AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The liquor business "stands, by universal consent, in a class peculiarly within the police power" of the States. South Carolina v. United States, 199 U.S. 437 (1905). This power is an incident of society's right to self protection; it rests upon the right of the state to care for the health, morals and welfare of the people and extends to everything prejudicial thereto. Eberle v. Michigan, 232 U.S. 700, 707 (1913).

The Twenty-First Amendment to the United States Constitution grants to the States the power to control the liquor industry within their boundaries (1 U.S.C. Amendment 21). It has been interpreted to confer upon the States broad regulatory power over the liquor traffic within their territories. Hostetter v. Idelwild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964); Joseph E. Seagram and Son, Inc. v. Hostetter, 384 U.S.

35, 41 (1966).

The Supreme Court recently reviewed the powers of the States pursuant to the Twenty-first Amendment in California v. LaRue, 409 U.S. 109 (1972). In LaRue, the Court discussed the cases in which it recognized that the Twenty-First Amendment conferred something more than the normal state authority over public health, welfare and morals and noted that those "decisions did not go so far as to hold that the Twenty-First Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations." Id. at 115.

Womens' Liberation Union of Rhode Island v. Israel, 512 F. 2d 106 (1st Cir. 1975):

> "LaRue, while it reiterates the proposition long embraced by the Court that the states have broad powers to re-

> gulate the sale of liquor, does not release the states from the requirement that the objective of the regulation be permissible, and that the means selected be rationally related to the end to be achieved."
> Id. at 108.

Thus, the police power of the STATE with respect to regulation of the liquor industry is limited by the concept of due process. Parks v. Allen, 426 F. 2d 610, 613 (5th Cir. 1970).

It is unreasonable for the STATE, purportedly in the interest of the public's welfare, to suspend an employer's liquor license on the theory of its responsibility for a single illegal act of an employee committed outside the scope of his employment duties and at a time when he was not on duty. In other words, the STATE, by its action in the instant case, without authority pursuant

to the State Constitution or statutes, holds each California liquor license employer to a standard of strict responsibility for the personal lives and habits of its employees. Such an imposition of responsibility against every liquor license employer is not reasonably adapted to the objective of inducing temperance in the use of liquor.

Presumably, discipline against a licensee serves two functions. Initially, it punishes a licensee for wrongful acts for which he is responsible. Secondly, such discipline acts as a deterent to others to avoid similar misconduct. Neither the punitive nor the deterrent function is served if a licensee is disciplined for an employee's isolated act of misconduct which the licensee could neither anticipate nor prevent in the exercise of due diligence. If the STATE's imposition

of strict responsibility against LA COSTA is upheld herein, discipline becomes totally arbitrary and capricious depending entirely upon the fortuitous circumstance of who happens to get caught and the whim of the STATE to prosecute. Licensees, then, would have precious little incentive to take the type of affirmative action to prevent misconduct which the STATE found to have been taken by LA COSTA (Appendix E.)

The Supreme Court in Morissette v. United States, 342 U.S. 246, 256 (1951), discussed the reasoning behind strict responsibility public welfare offenses.

> "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."

The Supreme Court speaks of the accused's responsibility to prevent the crime as the basis for the offense. The accused has a duty to the public, and if he is negligent in the performance of his duty because he falls below the reasonable expectations of society, then it is reasonable for him to be punished. Under the circumstances of this case (the continuous and ongoing affirmative steps undertaken by LA COSTA to prevent prostitution coupled with the commission of a single illegal act in a surreptitious manner at a time when the employee was not on duty), the California Constitution and corresponding statute have been unconstitutionally applied to LA COSTA and it is an abuse of the police power of the STATE to do so.

C. THE STATE'S APPLICATION OF ITS CONSTITUTION AND STATUTES TO THE SUSPENSION OF LA COSTA'S LIQUOR LICENSE IS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Article XX, Section 22, of the California Constitution provides in pertinent part:

> "...The Department of Alcoholic Beverage Control shall have the power, in its discretion, to deny, suspend or revoke specific alcoholic beverage licenses if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violatd any law prohibiting conduct involving moral turpitude..." [5]
> (Emphasis added.)

LA COSTA'S liquor license was suspended on the basis of the above constitutional provision and California Business and Professions Code Section 24200(a) which provides:

> "The following are the grounds which constitute a basis for the suspension or revocation of licenses:
>
> (a) When the continuance of the license would be contrary to public welfare or morals; but proceedings under this

> section upon this ground are not a limitation upon the department's authority to proceed under Article XX, Section 22, of the California Constitution."

The standard that the STATE must use for the suspension or revocation of an employer's liquor license is clear. It must "determine for good cause that the continuance of such license would be contrary to public welfare or morals." LA COSTA does not contend that the California Constitution or the Alcoholic Beverage Control statutes are unconstitutional; but rather, it contends that the STATE has unfairly and unreasonably misapplied the above-stated law to LAW COSTA in this matter and has thus violated the Fourteenth Amendment of the United States Constsitution.

LA COSTA was given notice of an accusation filed by the STATE, had a hearing on that accusation before an Administrative Law Judge, where it was

able to present, examine and cross-examine witnesses. This procedure encompasses the rudiments of procedural due process. Page v. Jackson, 398 F. Supp. 263 (N.D. Ga. 1975); Smith v. Thompson, 377 F. Supp. 556, 557 (N.D. Ga. 1974).

After presenting and proving the substantial defenses of no knowledge or acquiescence in the illegal conduct; adoption and rigid enforcement of affirmative preventative measures; and immediate termination of the employee for his single, surreptitious, illegal act, and the Administrative Law Judge's acknowledgement of truth of these defenses by specific findings, she nevertheless held that LA COSTA, by its agent, "suffered and permitted" the licensed premises to be used as a place to solicit an act of prostitution (Appendix E).

The record is devoid of any evidence that the employee was acting in the scope of the operation of the busi-

ness or of the liquor license at the time of the illegal act or that LA COSTA was so much as guilty of simple negligence in supervising the employee.

The STATE has created a standard of strict responsibility for each California liquor license whose employee commits an illegal act upon the premises at a time when he is not performing any employment function.

The STATE does provide a hearing but it is one that does not embrace an adequate opportunity to defend. Such a hearing is tantamount to no hearing since all defenses are ignored in favor of the strict responsibility doctrine. The opportunity to present every available defense is a requisite of due process. Lindsey v. Normet, 405 U.S. 56, 66,(1972). The fundamental requisite of due process is the opportunity to be heard at a hearing that is conducted in

a meaningful manner. Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The STATE's interpretation and application of the statutory requirement of a "determination for good cause that continuance of the license is contrary to public welfare and morals" to mean "responsibility for any illegal act of an employee" renders the due process requirements of notice and opportunity to be heard meaningless and hollow protections so that the hearing becomes nothing more than a charade. The deprivation of LA COSTA's liquor license, coupled with the STATE's unreasonable and unreasoned imposition of strict responsibility against every California liquor licensee is manifestly violative of the Fourteenth Amendment due process clause. Pearson v. Northeast Airlines Inc., 309 F. 2d 553, 563 (2nd Cir. 1962).

According to the STATE's application of the constitutional test of "determining for good cause", the only issues to be found at the hearing are whether the employee committed the illegal act and whether he is an employee of the liquor licensee. In most cases, the answers to these questions are known prior to the hearing.

If culpability of the licensee itself is not the issue at the hearing, then there is an irrebutable presumption that the licensee is subject to the loss or suspension of its liquor license any time one of its employees is found to have committed a public offense, regardless of whether the licensee has any control or responsibility for such an offense. Under due process, the automatic denial of a right on the basis of an irrebutable presumption is not warranted when such a presumption is not

necessarily true or universally true and when the STATE has reasonable alternative means of making the crucial determination. Vanlare v. Hurley, 421 U.S. 338 (1974). The interpretation and application of the due process clause are ostensibly procedural matters and the very nature of due process negates the use of inflexible procedures univerally applied to every imaginable situation. Goss v. Lopez, 419 U.S. 565 (1975).

The STATE's use of a regulatory scheme involving an irrebutable presumption resulting in strict responsibility of a licensee renders the licensee's "hearing" no more than a mere formality which conveniently ignores and bypasses the question of the fitness of LA COSTA as a licensee, and whether it acted in accordance with reasonable standards in its attempt to control unlawful activity on the premises. Such

a hearing is certainly not the kind mandated by the due process clause. Andrews v. Drew Municipal Separate School District, 507 F. 2d 611 (5th Cir. 1975). The position of the STATE completely ignores the constitutional requirement of specific findings of "good cause" and that "continuance of the license would be contrary to public welfare and morals". The special findings of the STATE all point to facts which indicate that a continuance of the license would be in the best interest of the public, rather than contrary to the public welfare and morals. LA COSTA has, in good faith, conscientiously and consistently adopted and followed a course of conduct designed to prevent and eliminate the occurrence of any illegal acts of misconduct on its premises. In light of such findings, there is no basis to conclude that any future opera-

tion of the premises by the licensee would be injurious to the public welfare. The Supreme Court has held that it is a denial of due process to convict a person upon a charge for which there is no evidence to support that conviction. Gregory v. City of Chicago, 394 U.S. 111,(1969).

The imposition of strict responsibility upon a licensee for the single, surreptitious personal, unpreventable and unforeseeable act of one of its employees is not reasonably related to the statutory objectives of the STATE and not permissible under the law. The licensee must be allowed to make a showing that affirmative and ongoing measures have been taken by it to prevent any wrongful acts on the premises and it must have the assurance that, as a matter of due process of law, such a showing will have a significant bearing on the

issue of the guilt of the licensee and will constitute a defense to the charge.

SUMMARY

At the hearing of the accusations, the Department presented proof of the following only:

(a) That Frank Rayo was an employee of La Costa; that on one occasion, he solicited a person to perform an act of prostitution. The Department then rested its case.

The burden was upon the Department to prove that Rayo was acting within the course and scope of his authority and that he was actually on duty at the time of the occurrence. Never did the Department prove these required facts.

After the Department rested, La Costa proved, shown by the Findings, the following facts:

1. Respondent corporation is

doing business as La Costa Country Club. Said country club is a large, complete resort which had approximately 950 employees in July, 1977.

2. Respondent has, on an on-going basis, taken affirmative steps to attempt to control prostitution on its premises as follows:

(a) Employment of security personnel; (b) Cooperation with and maintaining a working relationship with the Carlsbad Police Department; (c) Adopting unwritten rules forbidding employees to solicit or otherwise be involved in prostitution; (d) Communicating such rules to its department heads, including Frank Rayo.

3. Frank Rayo was terminated by respondent upon management being informed of his said misconduct.

4. The actions of Frank Rayo in relation to said misconduct were

performed in a surreptitious manner.

In addition, La Costa proved the following:

1. That Frank Rayo had no control or authority with respect to the operation of the La Costa cocktail lounge, bar or liquor facilities.

2. That Frank Rayo had no policy-making authority whatsoever.

3. No person in a managerial capacity at La Costa was aware of Frank Rayo's misconduct.

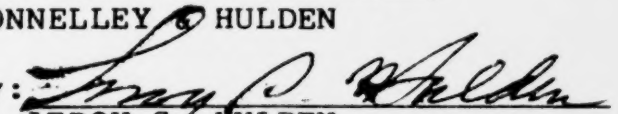
The Administrative Law Judge then totally disregarded all the evidence presented by La Costa other than as she acknowledged in her Special Findings listed above. Contrary to the California Constitution, Article XX, Section 22 requiring that good cause be shown that the continuance of the license would be contrary to the public welfare and morals, and in the absence of any such showing

or any such findings, the Administrative Law Judge recommended suspension of the La Costa liquor license. In other words, La Costa has been held strictly responsible for the single surreptitious act of an employee not shown to be within the course and scope of his duties, where it had done all it reasonable could to prevent this kind of activity on the premises, in accordance with the doctrine of strict liability. This is also in accordance with the argument of the Department that even if a groundskeeper raking a sand trap on the golf course attempted to procure a woman for prostitution, the doctrine of strict liability applied and La Costa's liquor licenses would be either suspended or revoked. This interpretation of the California Constitution and Statutes is totally erroneous in that it ignores the requirement that there be shown "good

cause" for imposition of discipline, and that it be shown that the "continuance of the license would be contrary to the public welfare and morals".

No such findings were made. Furthermore, in view of the evidence of La Costa's conserted efforts to avoid and prevent illegal activities upon its premises, no such findings could be made. The actions and decisions of the Administrative Law Judge, the Department, and the Board were arbitrary, unreasonable, and in violation of the California Constitution and the due process clause of the Fourteenth Amendment of the Unitied States Constitution.

RESPECTFULLY SUBMITTED,
DONNELLEY & HULDEN

By: 
LEROY S. HULDEN
Attorneys for Petitioner

Supreme Court, U. S.
FILED
DEC 11 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. ——— 79-906

RANCHO LA COSTA, INC., dba LA COSTA COUNTRY CLUB,

Petitioner,

v.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD and CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD AND THE CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

LEROY S. HULDEN
DONNELLEY & HULDEN
3366 Fifth Avenue
San Diego, California 92103
Telephone: (714) 299-8350

Attorneys for Petitioner

December 10, 1979

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

TABLE OF CONTENTS

PAGE

APPENDIX A:

Notice of Hearing Denied by the California Supreme Court, dated September 12, 1979..... 1

APPENDIX B:

Notice of Denial of Petition for Writ of Certiorari to Review Order of Alcoholic Beverage Control Appeals Board Issued by the Fourth Appellate District Court of Appeal of the State of California, dated August 17, 1979..... 2

APPENDIX C:

Decision by Alcoholic Beverage Control Appeals Board, filed July 17, 1979.....3-33

APPENDIX D:

Certificate of Decision by the State of California Department of Alcoholic Beverage Control, dated August 24, 1978..... 34

TABLE OF CONTENTS (Cont.d.)

PAGE

APPENDIX E:

Proposed Decision of Administrative Law Judge of Department of Alcoholic Beverage Control, dated August 17, 1978.....35-39

APPENDIX F:

Constitutions and Statutes.....40

U.S. Constitution
Fourteenth Amendment.....40-41
Twenty-First Amendment.....42

California Constitution.....42
Article XX,Section 22.....42-44

California Statutes.....45-46

APPENDIX G:

Footnotes.....47
1. §24200. Grounds.....47
2. §266i. Pandering; punishment.....47-48
3. §664. Attempts; punishment.....48-49
4. §647. Disorderly conduct.....49-50
5. H.D. Wallace & Assoc., Inc., v. Department of Alcoholic Bev. Control, 271 Cal.App.2d 589 (1969), etc.....50

CLERK'S OFFICE. SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

SEP 1 - 1978

I have this day filed Order

RECEIVED

In re: 4 Civ. *No.* 22122

Rancho La Costa, Inc.

vs.

ABC Appeals Board

Respectfully,

G. E. BISHEL
Clerk

68378-077 2-79 5M OSP

Appendix B

COURT OF APPEAL - FOURTH DIST.
FILED
AUG 17 1979
ROBERT L. FORD, Clerk
R. J. Smith
DEPUTY CLERK

COURT OF APPEAL

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

RANCHO LA COSTA, INC., Petitioner, vs. ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD, Respondent.	4 Civil No. 22122

SUPERIOR COURT NO. AB4622

BY THE COURT:

The Petition for Writ of Certiorari to Review Order of Alcoholic Beverage Control Appeals Board with Request for Temporary Stay is denied.

Presiding Justice

Copies to: Donnelley & Holden-SD
Attorney General-SD
Attn.Ms.Elizabeth Riggs
Superior Court-SD

FILED
JUL 17 1979
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

BEFORE THE ALCOHOLIC BEVERAGE CONTROL

APPEALS BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Accusation Against	AB-4622 File 11363; Reg. 9242 ALJ: Marilyn Nelson
RANCHO LA COSTA, INC., dba La Costa Country Club E/S El Camino Real, 2.5 miles south of Palomar Airport Road Carlsbad, CA 92008	Date and Place of Hearing April 5, 1979 314 West First St. Room F Los Angeles, CA
On-sale general license, three duplicates and a caterer's permit	For Department: Honorable George Deukmejian, Attorney General Elizabeth Riggs Deputy Attorney General
Respondent	For Applicant: Leroy Hulden, Attorney
Under the alcoholic beverage control act.	

Rancho La Costa, Inc., doing busi-

ness as La Costa Country Club, has appealed a decision of the Department of Alcoholic Beverage Control which determined: respondent violated sections 266(i), 664 and 647(b) of the California Penal Code; that grounds exist for the suspension or revocation of respondent's above-designated licenses in that the commission of said offenses on said premises created conditions contrary to public welfare and morals within the meaning of Article XX, section 22, of the California Constitution, and section 24200(a) of the Business and Professions Code; that grounds do not exist for the suspension or revocation of respondent's above-designated licenses pursuant to section 24200(b) of the Business and Professions Code in that the aforementioned offenses do not come within the meaning of said section. By way of

penalty, the respondent's licenses were suspended for a period of 30 days, with 25 days of said suspension stayed, for a total suspension of 5 days.

The department's decision further provides, where pertinent:

"FINDINGS OF FACT:

"COUNT I

"1. It is true that on July 25, 1977, respondent, by its agent and catering manager, Frank Rayo, did suffer and permit the said premises to be used as a place wherein Frank Rayo did solicit and attempt to solicit confidential informant "Rhonda" to engage in an act of prostitution.

"2. It is true that on July 25, 1977, respondent, by it agent and catering manager, Frank Rayo, did suffer and permit the said premises to be used as a place wherein Frank Rayo did attempt to procure confidential informant "Rhonda" to engage in an act of prostitution.

"SPECIAL FINDINGS:

"1. Respondent corporation is doing business as La Costa Country

Club. Said country club is a large, complete resort which had approximately 950 employees in July, 1977.

"2. Respondent has, on an ongoing basis, taken affirmative steps to attempt to control prostitution on its premises, as follows:

"a. Employment of security personnel.

"b. Cooperation with and maintaining a working relationship with the Carlsbad Police Department.

"c. Adopting unwritten rules forbidding employees to solicit or otherwise be involved in prostitution.

"d. Communicating such rules to its department heads, including Frank Rayo.

"3. Frank Rayo was terminated by respondent upon management being informed of his said misconduct.

"4. The actions of Frank Rayo in relation to said misconduct were performed in a surreptitious manner."

Appellants appeal upon all grounds available under Business and Professions Code section 23084.

Rhonda Lilien, working as a paid, civilian under-cover operative for the Sheriff's Department (R.T. 13-14), testified for the Department of Alcoholic Beverage Control. When working as a masseuse for the subject licensee (R.T. 24), she had conversations with one Terri Bishop, prior to July 25, 1977, with regard to being a prostitute at the La Costa resort (R.T. 35); on July 25, 1977, Mr. Rayo was called on the telephone by the bartender at their request, while Ms. Bishop was with the witness in the cocktail lounge of the licensee (R.T. 6); later, in the booth at the licensed premises, Rayo, Bishop and she discussed "working customers", which she understood to mean prostitution (R.T. 8); when she

said she was interested in working with them, he suggested it would be better if they left the cocktail lounge and go to his office for privacy (R.T. 8); they left the cocktail lounge, walked around the building "a bit", and went upstairs to Rayo's catering office which was opened by him with a key (R.T. 9-10); Mr. Rayo indicated that, since his customers were wealthy, some might want a couple of hours of sexual intercourse and others would desire an all-night affair (R.T. 11-12); he said that it would cost them approximately $50.00 for a single sexual act and $100 for one night (R.T. 12); he stated that the customers would be staying at the La Costa Country Club and at the Spa (R.T. 12); that he usually did not derive a profit, but that sometimes customers would tip him $10 or $20, and that the witness was to be available

to him for free sexual acts (R.T. 12, 37); he stated that the business was sporadic, but that sometimes she could make $500 on a weekend (R.T. 13); during these conversations, she had a small electronic recorder in her purse; she had received it from Sheriff's Deputy Randy Anderson, with whom she was working (R.T. 14-15).

Randall A. Anderson, a sergeant with the San Diego Sheriff's Department, testified for the Department of Alcoholic Beverage Control. On July 25, 1977, he gave Lilien a small transmitter to trasmit her conversations to his nearby vehicle, so he could listen to and record the conversations (R.T. 65, 68); on July 25, 1977, he was able to overhear Lilien's and Bishop's voices, and, although not able to identify it as Rayo's voice, he also heard a male

voice (R.T. 69); he heard the male introduce himself as Frank, tell Lilien he had been working with Bish[illegible] a prostitution operation for some time, and he would like to see Lilien involved in the operation after he screened her; also, that most of the customers were guests of the appellant; he overheard the male state that normally the fees charged by most prostitutes were $50.00 for a single act of sexual intercourse and $100.00 for all night (R.T. 70-72). Shortly thereafter, he arrested Bishop and Rayo in the catering office, while Lilien was present (R.T. 72); he gave Rayo the Miranda warning; after waiving his right to remain silent, Rayo told him he had been involved with Bishop and other prostitutes since February of the previous year and that his customers were wealthy guests at appellant's re-

sort (R.T. 73-74); that it was more or less expected of him to provide prostitutes for the guests (R.T. 74); and, for his services, he was entitled to occasional free sexual intercourse (R.T. 75). The witness made marks on a layout of the subject resort (Department's Exhibit 1), indicating where Lilien entered the bar and where he was parked during the subject conversation; the witness identified a diagram representing the interior of the La Costa Bar, although not to scale (R.E. 92-93; Department's Exhibit 2). In a three and one-half year period, Deputy Anderson made three other prostitution arrests in the cocktail lounge of the subject resort (R.T. 75-76).

Deputy Anderson was called by respondents to testify as an adverse witness. The tape recording he made of the subject conversation was from a receiver

in his police vehicle; since the tape recorder was lying on top of the dash of the vehicle, it picked up outside interference, along with other problems; he estimated approximately 25 percent of the conversation was audible on the tape (R.T. 128).

The department subsequently called Deputy Anderson as a rebuttal witness. He visited the La Costa clubhouse six times, in an official capacity, over a period of three and one-half years (R.T. 262); to the best of his knowledge, he was not known as a police officer by anyone at said resort (R.T. 263). He was told by Rayo that he had been working with various prostitutes at the resort for approximately two years (R.T. 271-277); that the facts of prostitution took place in the guest rooms of the resort (R.T. 278); that Rayo generally would

call Teri Bishop, or one of the other prostitutes, and inform them someone would be calling to arrange a meeting, which was generally on the resort premises (R.T. 278-279); that Rayo contacted one customer who arranged for a prostitute to have sex with 26 individuals for $500.00 (R.T. 278). The witness testified his report did not state specifically that Rayo introduced the customers to Bishop or that most of the acts took place at the LaCosta resort (R.T. 290-291).

Leslie L. Case, the San Diego District Administrator for the Department of Alcoholic Beverage Control, testified for the department. It was stipulated that a part of his duties includes keeping official files regarding alcoholic beverage licenses in San Diego County, including the respondent's (R.T.

96); respondent holds a bona fide master license and three duplicate licenses (R.T. 97); Department's Exhibit 1, in his files, was received from the respondent; each building outlined in red is a portion of the licensed premises (R.T. 98); he identified five documents, pertaining to the licensed premises, which were received into evidence (Department's Exhibits 1, 2, 3, 4 and 5).

The respordent introduced a declaration of Robin Kuest, presently living in New Mexico, as hearsay evidence, which stated, inter alia: Rayo was catering manager at the licensee's resort and had no control or authority with respect to the operation of the cocktail lounge, bar or liquor facilities; Kuest had instructed Rayo that prostitution would not be condoned and would result in the immediate dismissal

of any employee involved; and, that at that time there wre over 600 employees employed at the resort (Respondent's Exhibit B).

Doris M. Hogue, the directoress of the women's spa at La Costa Resort, testified for the respondent. Male customers are massaged by males (R.T. 134); Rhonda Lilien worked as a part-time technician and masseuse in the women's section (T.R. 135-136). The respondent introduced hiring forms regarding Lilien (Repondent's Exhibit C).

Robert S. Mott, General Manager of La Costa and Spa since March of 1968, testified for the respondent. Previous to his present position, he was employed at La Costa as Assistant to the general manager (R.T. 140). The respondent introduced a diagram depicting the La Costa Hotel and Spa (R.T. 140, Respon-

dent's Exhibit D). The witness described the various grounds and buildings reflected there (R.T. 141-145); in July of 1977, they employed approximately 950 persons (R.T. 163). There are 28 basic departments within the resort management, as well as departments within these departments; they have 37 department heads (R.T. 146); the catering manager heads a department which has 28 persons on the staff (R.T. 185); he is responsible for food functions in the conference center facility; this includes the set-up, decorations, and ensuring that the party goes well (R.T. 146); the catering manager also handles arrangements for the wine to be served (R.T. 184), complaints about service and arranges for live entertainment (R.T. 186); he has the right to hire and fire within his department, which includes busboys and

waitresses but not cocktail waitresses (R.T. 149). The director of sales handles room bookings and prepares the resume' for the function, which would then be submitted to the catering manager (R.T. 147); the catering manager would not have the authority to book the rooms, determine prices for meals or arrange for additional services, without higher authorization (R.T. 148); if alcoholic beverages are to be served, he contacts the beverage manager who arranges for bartenders and cocktail waitresses (R.T. 148). Rayo was discharged because of his activity; employees have been instructed that they would be immediately terminated and their case turned over to the local authorities, if involved in prostitution (R.T. 153); they have their own security force and have always cooperated with the Carlsbad

Police Department to eliminate prostitution in their cocktail lounge, which included giving the undercover detectives hotel keys to that they could appear to be guests (R.T. 150-163).

Roy J. Kundtz, Chief of Police for the City of Carlsbad, for four years, testified for the respondent. Rancho La Costa is within the City of Carlsbad and subject to his police department's judiscdiction (R.T. 189); he was acquainted with Robin Kuest when he was general manager of the subject hotel and spa (R.T. 189); he had several conversations with Kuest regarding prostitution at Rancho La Costa (R.T. 189); in 1974, he told Kuest he had heard rumors concerning prostitution at La Costa; Kuest informed him he did not know of any but, if there was, I would come out and do something about it; that he would cooperate (R.T. 190-191).

At that time, they occasionally placed detectives in the cocktail lounge (R.T. 191); in approximately 1975, he was encouraged by Kuest to come out and ensure there was no prostitution activity; at that time, he had not heard rumors of prostitution at La Costa (R.T. 192); later, he had another conversation with Kuest; the relationship was such that any time their detectives wanted to pose as hotel guests, arrangements were made for them to do so (r.T. 193); there have been no arrests for prostitution by his department at Rancho La Costa within two years; there was never a lack of cooperation by the management thereof (R.T. 193); in his opinion, the officials at La Costa have continually made a good effort to control prostitution (R.T. 193). To his recollection, the La Costa management has never called his department to request

the arrest of a prostitute at their bar (R.T. 204); he has heard rumors of prostitution in the subject bar (R.T. 201); in the last four years, female and male undercover officers have worked in the bar without informing the management, yet they made no arrests (R.T. 209).

William S. Huntington, a police detective with the City of Carlsbad, testified for the respondent. At times, he has been assigned to work on prostitution cases at Rancho La Costa (R.T. 214); occasionally, they went out there on their own initiative while at other times they were called there by the management of La Costa, if they thought prostitutes were working on their premises (R.T. 214); he has received hotel keys from the management, so as to allow him to appear as a guest (R.T. 215); he encountered a known prostitute therein only on one

occasion, approximately three years previously, during the Tournament of Champions (R.T. 215); in his opinion, the licensee has made a good effort to eliminate prostitution (R.T. 217); he was known by some of the employees at the bar, so he never worked completely undercover therein (R.T. 218).

The respondent introduced the written material available to the guests in their rooms (Respondent's Exhibit E); and, the classified ad section of the San Diego Union of August 3, 1978, with regard to massage advertisements (Respondent's Exhibit F).

Allard Roen, a major stockholder, chief operating officer, and Chairman of the Board of respondent corporation, testified therefor. He did not deny they had an employee utilizing call girls, however, as soon as he knew of it, the

employee was terminated (R.T. 240-241, 248). They did not want prostitutes at their bar; it is not the image they desire (R.T. 241); they completely cooperated with the authorities in that regard (R.T. 242); however, it is a difficult problem as one cannot accuse someone of being a prostitute unless absolutely certain (R.T. 242). In his opinion, encouraging prostitution would be detrimental to their business because, while it might satisfy a few guests, it alienated many more if they observed the solicitations (R.T. 247); the gross income of the resort is in excess of 20 million dollars; if prostitution were allowed on the premises, he felt it would be detrimental to this income (R.T. 248-249). He concluded that Rayo had done it because he wanted to be a big shot (R.T. 248); the catering manager is a

liaison between management and the individuals having a conference (R.T. 253); as such, Rayo was in a position to receive requests for prostitutes; however, in the resort business there are probably a number of employees who have been requested to provide such services (R.T. 255-257).

Upon appeal appellant contends: the decision of the department is not supported by the findings, as determined by the administrative law judge, as there was no culpable conduct by the licensee, profit derived, ongoing misconduct in the licensed premises, control given to the subject employee, nor was the employee on duty or on the licensed premises; the department abused its discretion by holding that a license is strictly liable for an employee's isolated act of surreptitious, unpreventable criminal misconduct,

in view of the stringent measures taken to control prostitution; section 25601 of the Business and Professions Code has been unconstitutionally applied to appellant; the imposition of strict liability for a criminal offense in this case is not reasonably related to regulation of the alcoholic beverage industry; and, the department has improperly interpreted and applied Business and Professions Code section 25601, has created an irrebutable presumption that a licensee is guilty of violating section 25601, and that the continuance of its license is contrary to public welfare and morals if an employee commits an act prohibited by Business and Professions Code section 25601.

Appellant's contentions the decision of the department is not support by the findings and constitutes an abuse of

discretion, for the reasons stated above, is devoid of merit. A licensee can be held liable for a single, isolated criminal act of an employee under Business and Professions Code section 24200(a), even though the employee is not in control of the licensed premiss. Under the facts, a corporate director and officer, Mr. Roen, admitted: "Nobody's denying" the employee "was using call-girl prostitution" (R.T. 240-241, 248; see Evidence Code sections 1221 and 1222). However, the testimony of witness Lilien indicated the initial solicitation discussion occurred in the cocktail lounge and that the balance of the solicitation occurred in the catering manager's office on the licensee's property. Also, Deputy Sheriff Anderson testified that Rayo, the catering manager, admitted he had been providing prostitutes for guests

of the licensee for approximately two years. This evidence, although hearsay, supplements other testimony and explains the reason for the solicitaion of prostitution by the licensee's manager (Government Code Section 11513(c)). The officers of the licensee admitted that Rayo was in charge of serving wine and arranging for the handling of conference functions, including the hiring and firing of waiters and waitresses who served the wine; that Rayo had 28 persons in his department. A corporation, which is a person by legal fiction, cannot function on its own; it must function through its managerial personnel. Hence, it was proper for the department to suspend this license upon the evidentiary showing of solicitation for continuing acts of prostitution with guests of th licensee, by the licensee's catering

manager (Harris v. Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board, 197 Cal.App. 2d 172 [17 Cal. Rptr. 315]). In Mantzoros v. State Board of Equalization, 87 Cal.App. 2d 140 [196 P.2d 657], the court stated:

> "The licensee, if he elects to operate his business through employees, must be responsible to the licensing authority for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours at licensed premises and the licensees would be immune to disciplinary action by the board. Such a result cannot have been contemplated by the Legislature ...."

Moreover, a licensee can even be held responsible for isolated acts by insignificant employees, as in Reimel v. Alcoholic Beverage Control Appeals Board, 252 Cal.App. 2d 520 [60 Cal.Rptr. 641], where the court held the licensee could

be disciplined even though it was an isolated incident of which neither the general manager nor any other responsible officer of the licensee had actual knowledge. The court pointed out that the licensee could draw no protection from the fact that he had taken reasonable precautions to prevent such violations. In Copeland v. Department of Alcoholic Beverage Control, 241 Cal.App.2d 186 [50 Cal.Rptr. 542], the court pointed out that the disciplining of licensees is for the protection of the public and not for the punishment of the licensee. The discipline herein was reasonably related to regulation of the alcoholic beverage industry. Here, Mr. Rayo had the managerial authority to exercise the licensee's privilege with regard to serving wine for guests of the licensee. As the person in charge of wine service

at convention functions, he was necessarily in charge of enforcing the alcoholic beverage laws thereat. The combination of Rayo's convention catering manager's position, the liquor license and the prostitution services conplemented each other in this illegal activity. Moreover, the likelihood of such activity at conventions would seem not to be unusual. If handled surreptiously, prostitution might book convention bookings.

Appellant's citation of Business and Professions Code section 25601 and disorderly premises cases thereunder are inapposite because section 25601 requires proof of several incidents before a licensed premises can be classified as a disorderly premises. Appellant's contention that Business and Professions Code section 25601 was unconstitutionally

applied to the appellant also in inapposite, since a violation of section 25601 is not involved in the department's decision.

Appellant's citation of H.D. Wallace and Associates v. Department of Alcoholic Beverage Control, 271 Cal.App. 2d 580 [76 Cal.Rptr. 749], is not in point since Wallace was involved in acts that had no relation to his licensed premises; whereas, in instant case the solicitation of prostitution occurred in the manager's office and the cocktail lounge of the premises, and the prostitution was intended for the licensee's patrons and guests, as discussed supra.

It has been stated that the provisions of Article XX, section 22 (with reference also being made to Business and Professions Code section 24200(a)) are made self-executing and revocation

of the license may be based upon that ground alone (Vallerga v. Department of Alcoholic Beverage Control, 53 Cal.2d 313 [1 Cal.Rptr. 494]; also see Mack v. Department of Alcoholic Beverage Control, 178 Cal.App.2d 149 178 [273 P.2d 372]). However, we need not rule on whether the conduct in question constituted a violation thereof per se, since the licensee's employee violated Penal Code sections 266(i), 664 and 647(b). Hence, sanctions could be imposed under the constitutional provision and Business and Professions Code section 24200(a) (Maloney v. Department of Alcoholic Beverage Control, 172 Cal. App.2d 104 [342 P.2d 520]; Reimel v. Alcoholic Beverage Control Appeals Board, 252 Cal.App. 2d 520 [60 Cal.Rptr. 641]). The department's findings that Rayo's superiors did not know of these circumstances, that affirmative steps had been

taken to control prostitution on the premises, and that Rayo was terminated by the appellant, are not in conflict with the determination of appellant's liability for its employee's acts under the cases cited, supra. It would appear, however, that such findings were taken into consideration as mitigation evidence in fixing the penalty.

For it's manager's crimes, the department suspended appellant's license 30 days, with an actual suspension of 5 days and the remainder stayed. We conclude this did not constitute an abuse of its discretion as to the penalty as a matter of law (Lake v. Civil Service Commission, 47 Cal.App. 3d 224). The fact that reasonable minds may differ as to the propriety of the penalty imposed only serves to fortify the conclusion that the department acted within

the broad area of discretion conferred upon it (Martin v. Alcoholic Beverage Control Appeals Board and Haley, 52 Cal. 2d 287 [341 P.2d 296]).

For the foregoing reasons, the department's decision is affirmed.

PETER M. FINNEGAN, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Members concurring:

Jacob F. West
James S. Lee

STATE OF CALIFORNIA
DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL

CERTIFICATE OF DECISION

File 11363
Reg. 9242

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by a Hearing Officer of the Office of Administrative Procedure, adopted said proposed decision as its decision in the case therein described on August 24, 1978.

A representative of the Department will call on you on or after October 12, 1978 to pick up the license certificate.

Sacramento, California
Dated: August 24, 1978

Beatrice Smalley
Hearing and Legal Unit

ABC-132 (8-71)

STATE OF CALIFORNIA
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

IN THE MATTER OF THE Accusation Against:	File 11363 Reg.9242 Folios: 1500
RANCHO LA COSTA, INC. La Costa Country Club E/S El Camino Real, 2.5 Miles South of Palomar Airport Road Carlsbad 92008	Time of Hearing: 8/2/78 11:00 a.m. 8/3,4/78 9:00 a.m.
on-sale general license, 3 duplicates and a caterer's permit	Licenses: 47-11363,2 dup. dup 48 & 58
Respondent.	Place of Hearing: 1350 Front St.,Rm.B-107,San Diego
under the Alcoholic Beverage Control Act.	Reporter: Cert. L-16188

Appearances:
For Dept: Frank Britt,Counsel
For Resp: Leroy S. Hulden, Atty.
3366 Fifth Avenue
San Diego, 92103
Rec.d Aug.17,1978

I hereby certify that the following constitutes my proposed decision in the above-entitled matter as a result of the hearing held before me at the above time and place, after due notice thereof having been given according to law, and I hereby recommend its adoption as the decision of the Department of Alcoholic Beverage Control

PROPOSED DECISION

FINDINGS OF FACT:

COUNT I

1. It is true that on July 25, 1977, respondent, by its agent and catering manager, Frank Rayo, did suffer and permit the said premises to be used as a place wherein Frank Rayo did solicit and attempt to solicit confidential informant "Rhonda" to engage in an act of prostitution.

2. It is true that on July 25, 1977, respondent, by its agent and catering manager, Frank Rayo, did suffer and permit the said premises to be used as a place wherein Frank Rayo did attempt to procure confidential informant "Rhonda" to engage in an act of prostitution.

SPECIAL FINDINGS:

1. Respondent corporation is doing business as La Costa Country Club. Said country club is a large, complete resort which had approximately 950 employees in July, 1977.

2. Respondent has, on an ongoing basis, taken affirmative steps to attempt to control prostitution on its premises, as follows:

a. Employment of security personnel.

b. Cooperation with and maintaining a working relationship with the Carlsbad Police Department.

c. Adopting unwritten rules forbidding employees to solicit or otherwise be involved in prostitution.

d. Communicating such rules to its department heads, including Frank Rayo.

3. Frank Rayo was terminated by respondent upon management being informed of his said misconduct.

4. The actions of Frank Rayo in relation to said misconduct were performed in a surreptitious manner.

SPECIAL RULING:

Respondent cited Coleman v. Alcoholic Beverage Control Appeals Board, 71 C.A. 3d 336, an opinion which was not published in the official reports pursuant to the order of the Supreme Court of the State of California dated August 19, 1977. Rule 977 of the California Rules of Court prohibits the citation of non-published opinions by a court or by a party in any other action, with certain exceptions. Inasmuch as it has been held that a non-published decision is not available as precedent, the citation of said Coleman case is not determinative of the issues herein. See People v. Gomez, 26 C.A.3d 928 (103 Cal. Rptr. 453); People v. North Beach Bonding Co., 36 C.A. 3d 663 (111 Cal. Reptr. 757).

DETERMINATION OF ISSUES PRESENTED:

1. Respondent violated Sections 266i, 664, and 647 (b) of the California Penal Code. Grounds exist for the sus-

pensation or revocation of respondent's above-designated licenses in that the commission of said offenses on said premises created conditions contrary to public welfare and morals within the meaning of Article XX, Section 22, of the California Constitution, and Section 24200(a) of the Business and Professions Code.

2. Grounds do not exist for the suspension or revocation of respondent's above-designated licenses pursuant to Section 24200(b) of the Business and Professions Code in that the aforementioned offenses do not come within the meaning of said section.

PENALTY OR RECOMMENDATION:

Respondent's above-designated licenses are suspended for a period of thirty days, with twenty-five days of said suspension stayed, upon the condition that no subsequent final determination be made upon hearing or upon stipulation, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed portion of the penalty;

and that should no such determination be made, the stay shall become permanent.

Dated at Los Angeles, California; August 15, 1978 .

Marilyn L. Nelson

MARILYN L. NELSON,
Administrative Law Judge
Office of Administrative
Hearings

MLN:nsa

UNITED STATES CONSTITUTION

AMENDMENT XIV--CITIZENSHIP;PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPROTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear

to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XXI--REPEAL OF PROHIBITION AMENDMENT

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

CALIFORNIA CONSTITUTION

§22. Intoxicating liquors

Sec.22. The State of California, subject to the Internal Revenue Laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the imposition into and exportation from the State, of intoxicating liquor. Intoxicating liquors, other than beers, shall

shall not be consumed, bought, sold, or otherwise disposed of for consumption on the premises, in any public saloon, public bar or public barroom within the State; provided, however, that subject to the aforesaid restriction, all intoxicating liquors may be kept and may be bought,sold, served, consumed, and otherwise disposed of in any bona fide hotel, restaurant, cafe, cafeteria, railroad dining or club car, passenger ship, or other public eating place, or in any bona fide club after such club has been lawfully operated for not less than one year. The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State, and to collect license fees or occupation taxes on account thereof and shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals. It shall be unlawful for any person other than a licensee of said board to manufacture, import or sell intoxicating liquors in this State. Until the Legislature shall otherwise provide, the privilege of keeping, buying, selling, serving, and otherwise disposing of intoxicating liquors in bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and in bona fide clubs after such clubs have been lawfully operated for not less than one year, and the privilege of keeping,

buying, selling, serving, and otherwise disposing of beers on any premises open to the general public shall be licensed and regulated under the applicable provisions of the so-called State Liquor Control Act, California Statutes 1933, Chapter 658, insofar as the same are not inconsistent with the provisions hereof, and excepting that the license fee to be charged bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and any bona fide clubs after such clubs have been lawfully operated for not less than one year, for the privilege of keeping, buying, selling, or otherwise disposing of intoxicating liquors other than beers and wines, shall be $250.00 per year, or $62.50 per quarter-annum for seasonal business, subject to the power of the State Board of Equalization to change such fees.

The Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of liquor contained in the original packages, where such liquor is not to be consumed on the premises where sold.

The Legislature shall provide for apportioning the amounts collected for license fees or occupation taxes under the provisions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper.

All constitutional provisions and laws inconsistent with the provisions hereof are hereby repealed. (Added Nov.8, 1932; amended Nov.6,1934.)

CALIFORNIA STATUTES

CHAPTER 7. SUSPENSION AND REVOCATION OF LICENSES

§24200. Grounds

The following are the grounds which constitute a basis for the suspension or ***revocation of licenses:

(a) When the continuance of a license would be contrary to public welfare or morals; but proceedings under this section upon this ground are not a limitation upon the department's authority to proceed under Article XX, Section 22, of the California Constitution.

(b) Except as limited by***Chapter 11 (commencing with Section 24850) and Chapter 12 (commencing with Section 25000) of this division, the violation or the causing or the permitting of a violation by a licensee of this division, any rules of the board adopted pursuant to Part 14 (commencing with Section 32001)of Division 2 of the Revenue and Taxation Code or any rules of the department adopted pursuant to the provisions of this division, or any other penal provisions of law of this state prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors.

(c) The misrepresentation of a material fact by *** an applicant in obtaining *** a license.

(d) The plea, verdict, or judgment of guilty, or the plea of nolo contendere

to any public offense involving moral turpitude or under any federal law prohibiting or regulating the sale, exposing for sale, use, possession, or giving away of alcoholic beverages or intoxicating liquors or prohibiting the refilling or reuse of distilled spirits containers charged against the licensee.

(e) Failure to correct objectionable conditions constituting a nuisance within a reasonable time after receipt of notice to make such corrections from a district attorney under Section 373a of the Penal Code.
(Amended by Stats.1977,c.238,p.--§1.)

FOOTNOTES

1. §24200. Grounds. The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

....(b) Except as limited by Chapters 11 and 12 of this division, the violation or the causing or the permitting of a violation by a licensee of this division, any rules of the board adopted pursuant to Part 14 of Division 2 of the Revenue and Taxation Code of any rules of the department adopted pursuant to the provisions of this division, or any other penal provisions of law of this State prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or misgiving away, adulteration, dilution, misbranding, or mislabelling of alcoholic beverages or intoxicating liquors. ....

2. §266i. Pandering; punishment.

Any person who: (a) procures another person for the purpose of prostitution; or (b) by promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute; or (c) procures for another person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state; or (d) by promises, threats, violence or by any device or scheme, causes, induces, persuades, or encourages an inmate of

a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate; or (e) by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution; or (f) received or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution, is guilty of pandering, a felony, and is punishable by imprisonment in the state prison for not less than one year nor more than 10 years.

3. §664. Attempts; punishment.

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts as follows:

1. Offense punishable by five years or more. If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, or by imprisonment in a county jail, the person quilty of such attempt is punishable by imprisonment in the state prison, or in a county jail, as the case may be, for a term not exceeding one-half the

longest term of imprisonment prescribed upon a conviction of the offense so attempted; provided however, that if the crime attempted is one in which there is no maximum sentence set by law or in which the maximum sentence is life imprisonment or death, the person guilty of such attempt shall be punishable by imprisonment in the state prison for a term of not more than 20 years.

2. Offense punishable by less than five years. If the offense so attempted is punishable by imprisonment in the state prison for less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year.

3. Offense punishable by fine. If the offense so attempted is punishable by fine, the offender conficted of such attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense so attempted.

4. Offense punishable by imprisonment and fine. If the offense so attempted is punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one-half the longest term of imprisonment and one-half the largest fine which may be imposed upon a conviction of the offense so attempted.

4. §647. Disorderly conduct.

Every person who commits any of the

following acts shall be guilty of disorderly conduct, a misdemeanor:

....(b) who solicits or who engaged in any act of prostitution. As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration. ....

5. "That a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude" has been interpreted in California and in other states to apply only to the individual liquor licensee and that such acts against moral turpitude committed by an employee cannot be imputed to the licensee unless it has knowledge of or acquiesces in the immoral act. H.D. Wallace & Associates, Inc. v. Department of Alcoholic Beverage Control, 271 Cal.App.2d 589 (1969), Monsour v. North Carolina State Board of Alcoholic Control, 5 N.C. App. 482, 168 S.E. 2d 490 (1969); Freud v. Davis, 64 N.J. Supra. 242, 165 A.2d 850 (1960).